Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States

DIALYSIS CLINIC, INC.,

Petitioner,

v.

NELLIE FRY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employer's managing agent can raise an inference of employment discrimination solely by comparing her treatment to the treatment of a younger male who was not a manager and whom she supervised. Specifically, whether a managing agent, who was terminated for her violations of a medical records policy which she issued and which she had responsibility to enforce, may use as her "comparator" for discrimination purposes, a younger, male, hourly employee, who had no managerial responsibility, whose misconduct involved a different employer policy, and whose discipline was in part approved by the plaintiff managing agent herself.

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioner: Dialysis Clinic, Inc. ("DCI"), a not-for-profit Tennessee corporation. DCI states that it is not a publicly traded corporation, that it has no parent corporation, and that there are no publicly traded corporations which own 10 percent or more of DCI.

Respondent: Nellie Fry ("Fry"), an individual.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dialysis Clinic, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

This is an employment discrimination case in which a managing agent of DCI's Wilkinsburg, Pennsylvania facility alleges age and sex discrimination due to her termination from employment for violating DCI's medical records policy, a

policy which she had issued and had responsibility to enforce.

After the District Court for the Western District of Pennsylvania granted in part and denied in part DCI's motion for summary judgment (App. 29a), the matter was tried before a jury on June 26-30, 2000. The District Court entered judgment for Fry based upon a jury verdict. (App. 17a). DCI timely appealed to the United States Court of Appeals for the Third Circuit. The Third Circuit Court of Appeals affirmed by Order and Opinion of August 30, 2001, which is reported at 2001 U.S. App. LEXIS 20092 (3rd Cir. August 30, 2001). (App. 14a). DCI timely filed a request for rehearing and for rehearing *en banc,* which was denied by Order entered on October 16, 2001. (App. 32a).

JURISDICTION

The court of appeals entered its judgment on August 30, 2001. Petitioner timely filed a petition for rehearing and for rehearing *en banc* on September 13, 2001. On October 16, 2001, the court of appeals issued its decision and order denying petitioner's petition for panel rehearing and rehearing *en banc.* (App. 32a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent portions of 29 U.S.C. § 623 (hereinafter referred to as "ADEA") and 42 U.S.C. § 2000e (hereinafter referred to as "Title VII") are set forth at p. 33a of the Appendix.

STATEMENT OF THE CASE

This employment discrimination case originally was brought in the United States District Court for the Western District of Pennsylvania under 42 U.S.C. § 2000e and 29 U.S.C. § 623, and federal jurisdiction exists under 28 U.S.C. § 1331.

A. General Background and Description

Fry is the former managing agent of DCI's Wilkinsburg clinic, where she was the Clinical Supervisor. On July 30, 1996, DCI learned that Fry admittedly had created a false medical chart after she previously had been instructed some weeks prior to correct a false entry she had made on that same patient's medical chart. DCI also learned that Fry could not produce the original medical chart which contained her first false entry. Fry was terminated for violation of DCI's medical records policy, a policy which Fry had issued and had ultimate responsibility to enforce.

Fry sued alleging that her termination was age and sex discrimination. Fry was replaced as Clinical Supervisor by an older female, Nancy Moskyok. Fry has admitted in these proceedings that she could not establish a *prima facie* case of age or sex discrimination other than by comparing her termination to the treatment of a younger male employee, and Fry has attempted to establish a *prima facie* case of age and sex discrimination *solely* on that basis. The younger male whom Fry claims as a comparator is a younger male machine technician, Alan Shearer, whom Fry supervised and whose discipline Fry occasionally approved. DCI submits that, as a matter of law, Fry and Shearer are not "similarly situated" and cannot be adequate comparators. Since the differing treatment

of Fry and Shearer is not sufficient to raise an inference of age and sex discrimination, and since Fry admittedly has no other manner by which to establish a *prima facie* case, DCI is entitled to judgment as a matter of law.

DCI is a not-for-profit corporation which provides dialysis treatment to patients with kidney disease. DCI operates stand-alone dialysis treatment facilities, such as the Wilkinsburg clinic where Fry was the Clinical Supervisor. Patients generally receive dialysis three days a week, and if they miss two or more scheduled consecutive treatments, their health could be threatened. DCI's clinics are subject to periodic audits by governmental licensing authorities, who inspect patient medical charts and other medical records.

In 1993, DCI hired Fry, who at that time was 50 years old, as the Clinical Supervisor of DCI's clinic in Wilkinsburg, Pennsylvania ("the Wilkinsburg clinic"). As Clinical Supervisor, Fry was the managing agent of DCI at the Wilkinsburg clinic as the senior day-to-day management official assigned to that clinic. Ms. Fry supervised, either directly or indirectly through subordinate supervisors, every other DCI employee assigned to work at the Wilkinsburg clinic on a daily basis. Ms. Fry was charged with enforcement of all of DCI's policies, including the medical records policy, which she issued for the Wilkinsburg clinic.

Fry's supervisor was David Chabal, an Administrator assigned responsibility for three DCI clinics, including the Wilkinsburg clinic. Chabal's office, however, was not at the Wilkinsburg clinic but rather at another DCI clinic located in North Hills, near Pittsburgh, Pennsylvania.

Fry alleges that DCI discriminated against her on the basis of her age and sex because, although she was terminated,

a younger male machine technician who backdated an entry on a water treatment log was merely written up and given probation. Fry further submits that Shearer's past record of numerous disciplinary infractions shows that he should have been terminated, too, or, that Fry should have been treated equally and given some lesser discipline than terminati n.

When Fry and Shearer were disciplined in July 1996, Shearer was an hourly paid machine technician who reported to the Chief Technician at the Wilkinsburg clinic. Fry supervised Shearer's boss, the Chief Technician. Shearer had no supervisory authority and had no responsibility for drafting, issuing or enforcing any DCI policies. The policy violation for which Shearer was disciplined did not involve a medical record and did not involve any policy which Shearer had any managerial responsibility to enforce. Throughout Shearer's employment, Fry had managerial responsibility for all employees at the clinic, including Shearer, and Fry approved and "signed off on" many of Shearer's past disciplinary infractions.

B. Fry's Termination

On Wednesday, July 10, 1996, Nancy Moskyok, a nurse at the Wilkinsburg clinic, and Lori Peterle, a nurse practitioner who worked for Medical Director Stephen Cooksey, reviewed a patient's medical chart and discovered that the patient had missed scheduled treatments on July 3 (Wednesday), 5 (Friday), and 8 (Monday). The medical chart contained a record of DCI employees' attempts to contact the patient on both July 3 and 8, but there was no notation indicating any such attempt to contact the patient on Friday, July 5, 1996.

Later that same Wednesday afternoon, the same two nurses noted that Fry had made an entry on the record as follows:

> 7-5-96 pt a no-show for treatment today No answer at pt home N.Fry RN.

The nurses noted that this appeared to be a back-dated record, and they also noted that Fry had not worked at all on Friday, July 5. Chabal was then notified of these concerns.

On the following day, Chabal reviewed with Fry several concerns regarding her job performance, including the apparent false entry of Friday July 5 on the patient's medical record. Chabal had confirmed that Fry did not work at all on Friday, July 5, and could not have called the patient on that day, as Fry had noted on the patient's chart. Fry explained that, although her entry was not correct, she had merely made a mistake on the date, that she had actually worked on Saturday, July 6, and that she had made the call on that day.

Chabal accepted Fry's explanation, but he explained that if she made another such false entry, she would be terminated. Chabal then instructed Fry to correct the progress note to reflect the correct date of her call to the patient.

Approximately two weeks later, Chabal again learned of a problem with the same patient's record. Chabal learned that the original progress note -- the one with Fry's July 5 entry -- was missing, that the entire patient progress note had been rewritten, and that, on the rewritten progress note, Fry's name did not appear, her initials did not appear, and there was no record on the rewritten progress note of Fry's call to the patient on Saturday, July 6.

Chabal investigated. Chabal then called David Hagewood, the Director of Human Resources for DCI (whose office is in Nashville, Tennessee) to explain that Fry appeared to have made a false entry on the progress note, had been told to correct the entry, had rewritten the note entirely without any entry from her, and now the original record with the initial false entry was missing.

Hagewood directed Chabal to take the following action: (1) if Fry could not produce the original medical record, Chabal was to terminate her; (2) if Fry had the original record, Chabal was to place her on a second written warning with probation. After this conversation, Chabal met with Fry. Fry had no explanation for her failure to make an entry for Saturday, July 6, and she could not produce the original medical record.[1] As instructed by Hagewood, Chabal told Fry that she was terminated.

DCI policy (as adopted and publicized by Fry herself) expressly charges the Clinical Supervisor with responsibility for the patients' medical records and expressly prohibits DCI staff from leaving records where they could be accessed by unauthorized personnel. Furthermore, the policy provides that, except on court order, original medical records may not be removed from the premises and instead must be maintained in areas secure from loss, destruction or unauthorized access at all times. DCI's strict records policy is directly resultant of its need to provide quality patient care and the numerous regulatory requirements with regard to the maintenance of medical records. DCI requires all original medical records to

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[1] Chabal testified, and his notes reflect, that Fry told him that she had thrown the original away. Fry disputes that testimony and says that she told Chabal she threw it on the Nurse Manager's desk.

be maintained for the purpose of periodic reviews by governmental inspectors who insist on seeing originals of all medical records and who raise questions when they note inaccuracies or the absence of an original record. Fry does not dispute that such inspections occur.

Fry was terminated for falsification and destruction of a medical record. Chabal did not discuss Fry's age with Hagewood, and Hagewood did not know her age. Chabal promoted an older female to replace Fry as the Clinical Supervisor. Following Fry's discharge and prior to her filing a charge of discrimination with the EEOC, Jeffrey Gaines, a younger male nurse at the Wilkinsburg clinic, was discharged, pursuant to DCI's policies and procedures, for writing someone else's initials on a patient's medical record as having completed certain procedures on the patient.

C. Shearer's Disciplinary Action

On July 29, 1996, the Chief Technician at the Wilkinsburg clinic noticed that Shearer failed to enter water test values on the water treatment log. The next day, July 30, the supervisor noticed that Shearer had written down water test values for July 29, essentially backdating the test results on the water treatment log by one day. When Chabal learned of Shearer's action, he confronted Shearer and then consulted Hagewood. Chabal explained to Hagewood that Shearer claimed to have conducted the test on the 29th but had simply forgotten to write down the water test results, so he wrote the results on July 30 for the test he had conducted on the 29th. Hagewood instructed Chabal to take the following steps: (1) Have another water values test run immediately; (2) if the results of the second test were "markedly different," Chabal should terminate Shearer because Hagewood believed such "markedly different" results would indicate that Shearer was

lying about what had happened; however, if the results were not "markedly different" (confirming to Hagewood that Shearer likely performed the test but merely back-dated the values by one day), Chabal was to place Shearer on a written warning and give him one year probation.

Chabal conducted another test, and the results were substantially the same. According to Hagewood's instructions, Chabal placed Shearer on written warning and gave him one year probation.

In the conversation with Hagewood, Chabal did not review Shearer's performance history, did not discuss Shearer's age with Hagewood, and Hagewood did not know Shearer's age. According to DCI's medical records policy, a medical record includes a patient's progress notes but does not include water treatment logs.

D. District Court's Holding

In its summary judgment motion, and in its renewed motion for judgment as a matter of law at the close of all proof, DCI argued that, as a matter of law, Fry could not establish a *prima facie* case of discrimination under either the ADEA or Title VII because the only means by which she was attempting to raise such an inference was the comparison of her treatment to the treatment of Shearer and that she and Shearer were not adequate comparators. The District Court in each instance ruled that Fry had created a jury issue on whether Fry and Shearer were adequate comparators. (App. 24a). The Court submitted that issue to the jury in its instructions. The jury ruled that Fry established that she and Shearer were adequate comparators, and it found, as a result, that DCI intentionally discriminated against Fry on the basis of her age and sex. (App. 17a).

E. Third Circuit's Opinion

The Third Circuit ruled that Fry could establish a *prima facie* case of age and sex discrimination by using Shearer as a comparator. (App. 9a-10a). The Court held that, because DCI does not have a separate set of rules by which it assesses the conduct of its managers, there was sufficient evidence to present a jury question on whether Shearer was "similarly situated" to be an adequate comparator.[2] (App. 9a). The Third Circuit further ruled that there was evidence by which the jury could determine that Shearer's misconduct was comparably serious to Fry's infraction. (*Id.*). On that basis, the Third Circuit determined that Fry could use Shearer as a comparator. (*Id.*).

In its ruling, the Third Circuit did not discuss or attempt to distinguish any of the contrary holdings of other Circuit Courts of Appeal, nor did it discuss or even attempt to distinguish this Court's rulings that employers face increased exposure for conduct of its managers in sex discrimination/sexual harassment matters.

At its core, this case rests upon whether Shearer as a matter of law can be an adequate comparator. In at least three other Courts of Appeal, he could not. If Shearer is not an adequate comparator, Fry cannot establish a *prima facie* case of discrimination under either the ADEA or Title VII, and Fry's claims must be dismissed.

The Third Circuit later denied DCI's petition for rehearing and for rehearing *en banc*. (App. 32a).

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[2] The Third Circuit did not discuss the fact that DCI had a medical records policy, separate from its Rules of Conduct in its handbook, which also reflects disciplinary measures, and that Fry herself issued that policy.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH CASES OF THIS COURT.

The Third Circuit decided an important question of federal law in a way that conflicts with the decisions of this Court, and this Court should grant this petition on that basis. R.10(c), Rules of the Supreme Court of the United States. In the standards relative to Title VII/sexual harassment claims, this Court has instructed all federal courts to assess the burden of proof and liability imposed upon an employer as singularly dependent upon whether the person alleged to have engaged in the misconduct is a manager. If a manager has engaged in the misconduct, the employer is strictly liable unless it has available and can establish an affirmative defense. If a non–manager has engaged in the misconduct, the plaintiff bears the burden of proof and liability depends upon a different standard. *See generally Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed. 2d 633 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed. 2d 662 (1998). Thus, under Title VII/sexual harassment, the burden of proof and liability consequences differ depending solely upon whether the alleged harasser is a manager or mere co-worker.

Yet, according to the Third Circuit, the differing treatment of a manager and a non-manager -- for violations of different policies -- can infer sex and age discrimination because these employees are similarly situated under the very same provision of the very same law (Title VII's prohibition of sex discrimination).

The Third Circuit's decision fails to mention the Supreme Court's rulings in *Faragher* and *Ellerth*, even though

those cases establish that the entire framework of Title VII's prohibition of sex discrimination differs depending upon whether the allegedly offending employee is a manager. This distinction rests upon the fact that a manager is an agent of the employer, while a non-manager is not. The employer is saddled with this distinction in proof and liability because of its identity with the alleged manager/harasser, even if the employer's sexual harassment policy prohibits harassment by all employees.

Here, however, the Third Circuit's decision allows a manager, as a potential employment discrimination plaintiff, to turn the stricter standards required of employers by this Court's rulings into a weapon of alleged discrimination. For example, if an employer learns in an investigation that a manager has verbally harassed a subordinate, this Court's precedent would imply that the employer needs to take severe action, such as suspension or termination, for the manager's abuse of the authority to which he was entrusted and which authority identifies the employer as the manager and vice-versa. If the terminated manager then learns of a non-manager who had merely been warned (but not suspended or terminated) for similar misconduct, that manager, under Third Circuit precedent, could claim discrimination on the basis of whatever demographics of the manager (age, race or sex) differed from the non-manager employee. Indeed, as discussed in more detail *infra*, a manager conceivably could create her own comparator by not consistently enforcing an employer's policies against non-management employees and thereby safeguard her own potential claim.

Fry was the manager and agent in charge of enforcing the very policy which she violated. Fry's conduct, as Clinical Supervisor, had significantly different implications for DCI

than did Shearer's conduct. Fry had responsibility for supervising the clinic, for maintaining the clinic's medical records, and for enforcement of the medical records policy. Fry was DCI's agent, and her misconduct within the scope of her agency could impute liability to DCI in a manner that the actions of Shearer could not. As a matter of law, DCI's potential liability differed significantly as between the actions of Fry and Shearer and, as such, DCI held Fry to a higher standard than Shearer. Shearer cannot, therefore, be an adequate comparator for Fry.

This Court has recognized these realities as controlling in the enforcement of Title VII's prohibition against sex discrimination. However, the Third Circuit never mentioned this Court's rulings in *Faragher* and *Ellerth*. In essence, under the Third Circuit's decision, an employer must either articulate a different set of policies for all of its managers' conduct, or it must not take more severe action against a manager than it takes against a non-manager, even though the manager's conduct has far greater implications for the employer. If an employer does take more severe action against the manager, and if the demographics of the manager differ from a subordinate who was treated less harshly, the employee can then use this differing treatment as a potential weapon.

In light of the holdings of *Faragher* and *Ellerth*, DCI's exposure under Title VII is greater for the actions of its agents, like Ms. Fry, than for the actions of its non-managerial staff. The Third Circuit, however, undermines this directive with its requirement of a "same size fits all" disciplinary scheme for all employees, regardless of title, when an employer has a single set of rules applicable to all employees. The conflict between the Third Circuit's decision and the rulings of this Court is obvious and must be remedied.

Other Circuits have elaborated on this body of law. *In Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994), the Sixth Circuit noted that the actions of a supervisor, as an "agent" of the company, could impute liability to the company regardless of whether the company had any knowledge of the action. *Pierce*, 40 F.3d at 803-04. However, a non-agent employee's conduct will only impute liability if the employer "knew or should have known" about it.

The Seventh and Tenth Circuits also confirm the necessity of this differentiation. *See Watts v. City of Norman*, 2001 U.S. App. LEXIS 23905 at *15-16 (10th Cir. November 5, 2001)("An employer who entrusts greater responsibility to its supervisors than to ordinary employees surely can be expected to exact greater responsibility from them."); *Hoffman v. MCA, Inc.*, 144 F.3d. 1117, 1124 (7th Cir. 1998)("MCA could reasonably expect a higher level of professionalism from [its Vice President] than it could expect from less experienced and lower-ranking sales representatives."). Clearly, courts make the distinction between the two groups, so naturally, it follows that responsible employers should do the same. In the instant case, DCI has every right to expect more from Fry than from an employee like Shearer. By virtue of her title alone, Fry's actions have far more severe implications for DCI.

This Court has mandated differing analyses for adjudging the acts of supervisors and those of lower level employees. The Third Circuit failed to give credence to this established distinction when it held that Fry and Shearer were sufficiently similarly situated to make DCI's dissimilar treatment of them inferential of age and sex discrimination. For this reason the Court should grant certiorari.

II. THE THIRD CIRCUIT'S DECISION THAT A MANAGING AGENT IS SIMILARLY SITUATED IN ALL RELEVANT RESPECTS TO AN HOURLY, NON-MANAGEMENT EMPLOYEE IS INCONSISTENT WITH OTHER APPELLATE COURTS THAT HAVE CONFRONTED THE ISSUE.

Establishing uniformity of federal doctrine is a core basis for the exercise of this Court's certiorari jurisdiction, and the circumstances of this petition clearly satisfy that fundamental criterion. See R. 10(a), Rules of the Supreme Court of the United States. There is a genuine conflict between the decision under review and decisions on the same issue by other federal appellate courts.

The Third Circuit's decision that an employer's managing agent (Fry) can establish a *prima facie* case by comparing her treatment to that of an hourly employee whom she supervises is inconsistent with rulings of the Sixth, Seventh and Tenth Circuit Courts of Appeals.[3] The ruling is even

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[3] *See Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994) (This court held that to be similarly situated, a plaintiff must prove that "all of the relevant aspects of his employment" were "nearly identical" to that of the chosen comparator. Here, the court found that the plaintiff's status as supervisor and the comparator's status as an employee under his supervision rendered the two sufficiently dissimilar to permit the employer to take separate and more severe disciplinary action against the supervisor, although their misconduct was very similar); *Hoffman v. MCA, Inc.*, 144 F.3d 1117, 1124 (7th Cir. 1998) (This court found the defendant employer not liable for alleged discrimination based on the plaintiff's (Vice President and Manager) attempt to compare the employer's treatment of him to that of a lower level employee, stating "MCA could reasonably expect a higher level of professionalism from Hoffman . . . than it could expect from less experienced and lower-ranking sales representatives."); *Watts v. City of Norman*, 2001 U.S. App. LEXIS 23905 (10th Cir. November 5, 2001) (finding that a fire chief and fireman were not similarly situated for purposes

inconsistent with a Pennsylvania district court case, a decision which the Third Circuit affirmed without opinion.[4]

In order to infer unlawful discrimination from their differing treatment, the employment discrimination plaintiff and the individual to whom she compares herself must be similar in "all relevant respects." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994). Recent cases from outside the Third Circuit have treated the dissimilarity of a manager and a non-manager for this purpose as clearly established law: "Non-supervisory and supervisory employees cannot be deemed similarly situated . . . . The distinction between supervisors and non-supervisors is clearly relevant to whether we would expect the employees in this case to be treated the same in the absence of discrimination." *Watts v. City of Norman*, 2001 U.S. App. LEXIS 23905, *15-16 (10th Cir. November 5, 2001). *See also Pierce, supra,* 40 F.3d at 802 ("[U]nlike the case of *supervisor* Pierce, the company would

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of employment discrimination, and thus that the City was correct in more severely disciplining the fire chief than the fireman for an altercation which occurred between both individuals.); *Jones, et. al v. Denver Post Corp.*, 203 F.3d 748, 753 (10th Cir. 2000) (finding a supervisor and employee not similarly situated, thus justifying the less stringent punishment against the supervisor for her and the plaintiff's identical conduct).

[4] The district court stated that the plaintiff and the employee to whom she compared herself were not "remotely in similar situations,"as the other employee was "a junior faculty member undergoing tenure review, while [plaintiff] was a senior tenured faculty member and department Chair. *Brogan v. La Salle University*, 70 F.Supp. 2d 556, 566 (E.D. Pa. 1999), *aff'd*, 229 F.3d 1137 (3rd Cir. 2000)(*citing Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 802-03 (6th Cir. 1994). It is intriguing that, in the decision under review, the Third Circuit did not mention or even distinguish this case, apparently leaving employers within its jurisdiction to guess as to which standard applies.

have the opportunity to assess and remedy any sexual harassment complaints lodged against *non-supervisor* Kennedy before incurring liability. . . . Thus Pierce and Kennedy are not similarly situated employees.")(emphasis added); *Hoffman v. MCA, Inc.*, 144 F.3d 1117, 1124 (7th Cir. 1998)("We cannot say that MCA's different treatment of less-experienced and lower ranking sales representatives means that MCA's proffered reason for firing [the Vice President] is pretextual.").

Fry, the day-to-day managing agent of the Wilkinsburg clinic who actually "signed off on" much of the discipline imposed upon Shearer, and Shearer, a non-agent, lower ranking hourly employee, are not similarly situated in *all* relevant aspects. In fact, they are not similarly situated in *any* relevant aspect except that both were employed by DCI at the same clinic. Such tenuous connection alone is not sufficient to create adequate comparators.

Shearer was a non-licensed, hourly paid, non-management machine technician who had no responsibility for, or even dealings with, patient progress notes or medical records. Shearer was responsible for entering data into a water treatment log, a DCI record that is not a medical record. Fry, on the other hand, was a licensed Registered Nurse and an exempt manager, the day-to-day managing agent of DCI responsible for the Wilkinsburg clinic. Fry was Shearer's indirect supervisor, and she signed off on several of Shearer's disciplinary actions.

Fry, as Clinical Supervisor, had ultimate responsibility for the maintenance of the clinic's medical records, the originals of which (and the accuracy of which) are required by governmental inspectors for compliance audits. Fry's conduct involved including false entries into both the new patient record and the missing original record. Unlike Shearer, Fry's conduct

violated the very policy she was entrusted to enforce to ensure compliance with governmental audits.

The implications of the Third Circuit's holding are far reaching. If this ruling stands, employers will be forced to treat their managers and low level employees equally in all aspects of discipline. Yet, one has supervisory authority, the other does not. One is entrusted to enforce company rules, which reasonably mandates a heightened obligation to follow them.

The Third Circuit undermines any such distinction. In that circuit, employees apparently can seek discovery of any and all employees at the employer organization, pick and choose a "comparator" regardless of status, title, or responsibility, to seek an instance of differing discipline and thereby establish an inference of discrimination. This logic essentially undermines the well-established rubric the of *McDonnell Douglas* tripartite analysis.

The Sixth, Seventh and Tenth Circuit Courts of Appeal have appreciated the material differences between a manager and a non-agent employee and have held accordingly. In the present case, Fry's conduct as supervisor had significantly different implications for DCI than did Shearer's. Clearly, the Third Circuit's ruling that these two individuals were similarly situated is in error and should be reversed.

The Third Circuit also erred in holding that employees can be considered similarly situated, for purposes of the employer's punishment of them, when their acts of misconduct are not comparable. This ruling is in conflict with the Sixth

Circuit and District of Columbia Circuit Courts of Appeals.[5] In fact, the District of Columbia Circuit actually states that individuals who are reprimanded by an employer cannot compare the severity of their reprimand to that of other employees if the acts preceding the punishment are not of "comparable seriousness." *Holbrook v. Reno*, 196 F.3d 255 (D.C. Cir. 1999). DCI submits that "comparable seriousness" did not exist among Fry's and Shearer's conduct because Fry's conduct, by the very nature of her position with the company, becomes DCI's conduct. The Third Circuit, and Fry, ask that jurors be allowed to determine whether the violations of different company policies are of equal or greater seriousness when one of the employees who engages in the behavior is, by operation of law, the company itself and the other employee's behavior, by operation of law, is not. DCI even submits that the first point is improper in employment discrimination law because it asks a court or jury to assess the comparative seriousness of violations of different company policies. As a matter of law, such determinations are the province of business

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[5] See *Wellons v. Northwest Airlines, Inc.*, 2001 U.S. App. LEXIS 22580 (6th Cir. October 16, 2001) (finding that a plaintiff could not prove the racially discriminatory practices of her employer because she could not prove that she was similarly situated to two non-minority employees. The court found that the plaintiff had been disciplined for breaching the parties' collective bargaining agreement while the two comparators had not, thus meriting different measures of disciplinary action); *Holbrook v. Reno*, 196 F.3d 255 (D.C. Cir. 1999) (finding that plaintiff could not adequately make out a prima facie case of employment discrimination when the individuals to whom she sought to compare herself had not committed acts of "comparable seriousness." More specifically, the plaintiff was suspended for "lying and blatant insubordination" while the two individuals to whom she compared herself were allowed to graduate, and one was reprimanded for being the "class clown" while the other admitted to "drinking and driving.")

judgment.[6] Even so, the second point is absurd; no reasonable jury could determine that a policy violation by a managing agent who can bind the company (particularly in these circumstances) can be as serious as a policy violation by a non-agent.

The Third Circuit's ruling mandates that, in imposing any discipline, an employer must assess what discipline it would impose if such misconduct were perpetrated by its highest officer at that particular location, and then impose that discipline on the person engaging in the conduct, regardless of their rank, title or responsibility. Otherwise, any employee who is reprimanded more harshly than another, even for a different (but subjectively believed more serious) offense, could establish the differing treatment (which was based upon different levels within the organization) as establishing actionable discrimination if by chance the demographics of the two comparators differed in some protected category. *McDonnell Douglas* and its requirement for an inference of discrimination requires more. Otherwise, its requirement of a *prima facie* showing will be eviscerated.

The Third Circuit's approval of the District Court's finding that Fry and Shearer are adequate comparators for purposes of proving a *prima facie* case of employment discrimination restricts an employer's liberty to expect and require higher standards of performance from its managers, and is thus in conflict with the Sixth, Seventh, and Tenth Circuits. Furthermore, a holding which allows two forms of misconduct, vastly different in severity because of its binding nature upon the employer, to be considered sufficiently similar so as to mandate the identical punishment of each wrongdoing

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[6] Such judgments are outside the scope of courts and juries, who do not sit as "super-personnel departments." *Barbour v. Browner*, 181 F.3d 1342, 1346 (D.C. Cir. 1999).

employee also, as the Sixth and D.C. Circuits have noted, unduly burdens each employer's autonomy to effectively manage its organization.

For these reasons, this Court should grant certiorari, or if it believes that the authorities are overwhelmingly one-sided, exercise its authority to summarily reverse the decision of the Third Circuit.

III. THIS CASE IS OF NATIONAL IMPORTANCE BECAUSE OF ITS PROFOUND NEGATIVE IMPACT ON AN EMPLOYER'S ABILITY TO EFFECTIVELY MANAGE ITS OPERATIONS.

The Third Circuit's ruling does far more than simply subject DCI, one employer, to liability that it does not deserve. It sets a precedent which allows disgruntled employees to successfully make claims of employment discrimination without first submitting any real evidence of disparate treatment. It essentially renders the *McDonnell Douglas* analysis extinct and ensures a significant onslaught (at least in the Third Circuit and others accepting its reasoning) of jury trials without first requiring some *prima facie* inference of discrimination.

The practical consequences of the Third Circuit's ruling are clear and daunting; its holding allows a manager to create her own comparator by refusing to fully enforce a company policy against subordinates that she may violate herself. For example, if a manager often was tardy, she could be lax in requiring enforcement of the company's tardiness policy against a younger male subordinate, and then, if she is reprimanded for tardiness, she could compare the company's treatment of her with her treatment of the younger subordinate

and argue the different responses constitute unlawful discrimination. Surely this sort of manipulation of the similarly situated analysis is not what the Court intended when it decided *McDonnell Douglas*.

This ruling also not only harms the employer, but it serves a great injustice to lower level employees. The very nature of non-agent employees' jobs subjects them to the supervision of the employer's agents. This ruling would allow an hourly employee who has been only slightly briefed on the employer policies and rules to be punished as severely as the supervisor who has not only been bathed in the knowledge of company policies, but who has also been entrusted to enforce them (and presumably paid for this duty). Managers are compensated at a higher level because employers depend on them, as their agents, to ensure that their subordinates are working efficiently and effectively. The assertion that managers and lower level employees are similarly situated in any way is suspect; moreover, the assertion that they are so situated in "all relevant aspects" is severely misguided.

The Third Circuit's ruling is of national importance because of its potentially crippling effect on the autonomy of employers to manage their businesses properly and efficiently. Perhaps even more troubling, under the Third Circuit's holding, lower paid employees could ultimately be forced to pay for the misconduct of their higher paid supervisors.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Timothy K. Garrett
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Attorney for Petitioner

APPENDIX A

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2222

NELLIE FRY
v.
DIALYSIS CLINIC, INC; DAVID CHABAL

Dialysis Clinic, Inc., Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
D.C. Civil Action No. 98-cv-01975
(Honorable Donetta W. Ambrose)

Submitted Pursuant to Third Circuit LAR 34.1(a)
May 14, 2001

Before: SCIRICA, GARTH and STAPLETON, Circuit Judges

(Filed August 30, 2001)

MEMORANDUM OPINION

SCIRICA, Circuit Judge.

This is an appeal from a denial of a motion for judgment as a matter of law in an employment discrimination case.

I.

Plaintiff Nellie Fry ("Fry") instituted the present action against the Dialysis Clinic, Inc. ("DCI") for unlawful discrimination when it terminated her employment on July 30, 1996.[1] Her direct supervisor, David Chabal, dismissed Fry after she failed to produce an original medical record on which she had made an error and for which she had substituted a rewritten record. Fry brought several claims against DCI and Chabal. After defendants' motion for summary judgment was granted and denied in part, Fry's claims were winnowed down to gender discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 ("Title VII") and age discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. ("ADEA"). The court also dismissed Chabal as a defendant. The case was then tried before a jury on June 26-30, 2000. At the close of Fry's argument, DCI moved for judgment as a matter of law under Fed. R. Civ. P. 50(a) on grounds that she had not made out a prima facie case of discrimination. The District Court denied the motion. Before the case was submitted to the jury, DCI again moved for judgment as a matter of law, reasserting is earlier argument. The court denied the motion, and the case was sent to the jury. The jury found in favor of Fry and awarded her $30,500 in back pay and $12,700 for compensatory damages. The jury also found that DCI acted

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[1] On appeal, all evidence and all factual inferences must be viewed in a light most favorable to Fry, the nonmoving party. Woodwind Estates, Ltd. v. Gretkowski, 205 F.3d 118, 122 (3d Cir. 2000).

willfully, resulting in double the back pay award as liquidated damages, for a total of $73,700. This appeal by DCI followed.
II.

In 1993, DCI hired Fry, a 50 year old woman, as the Clinical Supervisor of its dialysis clinic in Wilkinsburg, Pennsylvania. At the time of her dismissal in 1996, David Chabal was the clinic's administrator. The incident that allegedly instigated Fry's termination occurred in the beginning of July 1996 when a patient at the clinic missed three consecutive dialysis treatment appointments on July 1, July 3 and July 5. When Fry went to work on July 6, she noticed the patient had missed his appointment on the previous day. Unable to reach him at home, she marked the patient as a "no show" and entered July 5 as the date she attempted to telephone.

After a staff meeting on July 11, Chabal raised some job performance concerns with Fry, including the potential false entry on a patient's progress note made on July 5. In response, Fry admitted she mistakenly entered July 5 instead of July 6 (when she had actually been at work). Chabal then instructed Fry to correct the false entry. For this purpose, she had the appropriate nurses sign and date new entries on an updated progress note on July 11, along with the date of their original entries. On the rewritten progress note, Fry did not include an entry for July 6 when she allegedly attempted to telephone the patient.

About two weeks later, Dr. Stephen Cooksey, the clinic's medical director (but not a DCI employee), informed Chabal that the patient's original progress note was missing and that the rewritten progress note did not include Fry's entry for July 6. After speaking with the employees who had made the entries, Chabal explained the situation to David Hagewood, his

supervisor and DCI's Director of Human Resources, and asked for guidance on how to proceed. Hagewood instructed Chabal that Fry should be fired if she threw out the original progress note, because destruction of a medical record was cause for termination. Chabal and Richard Kelly, the assistant administrator, then called Fry into a meeting to discuss the whereabouts of the original progress note. What occurred at this meeting was disputed at trial. When asked about the patient's original progress note, Chabal and Kelly testified that Fry informed them she had discarded it. Fry, on the other hand, testified at trial that she never told Chabal and Kelly that she had thrown it out. Instead, she claimed to have left the original progress note, along with the rewritten record, on the charge nurse's desk for refiling. Regardless, Fry was fired after the meeting. She claims that her dismissal for failure to produce the original progress note indicates gender and/or age discrimination because a different clinic employee, Alan Shearer, a male under the age of forty, was treated more favorably under similar circumstances.

III.

The District Court had jurisdiction under 28 U.S.C. § 1331, and we have appellate jurisdiction over the court's final order under 28 U.S.C. § 1291. We exercise plenary review over an order granting or denying a motion for judgment as a matter of law, Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 88 (3d Cir. 2000); Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993). A court should only grant a motion for judgment as a matter of law if "viewing all the evidence which has been tendered and should have been admitted in the light most fav4aorable to [the] party opposing the motion, no jury could decide in that party's favor." Woodson v. Scott Paper Co., 109 F.3d 913, 919 (3d Cir. 1997) (quotation and citation omitted); Sheridan v. E.I. DuPont de

Nemours & Co., 100 F.3d 1061, 1072 (3d Cir. 1996) (en banc). "'The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party.'" Woodwind Estates, 205 F.3d at 122 (quoting Patzig v. O'Neil, 577 F.2d 841, 846 (3d Cir. 1978)). In the course of our review, it is important to recognize that "much of the record is comprised of trial testimony, that the jury had 'the unique opportunity to judge the credibility and demeanor' of the witnesses who testified at the trial, and that it reached its conclusions based in part on those observations." Woodson, 109 F.3d at 921 (quoting Quiroga v. Hasbro, Inc., 934 F.2d 497, 502 (3d Cir. 1991)).

IV.

DCI appeals the denial of its motion for judgment as a matter of law on grounds that Fry failed to establish a prima facie case of gender or age discrimination. The issue then is whether Fry presented sufficient evidence to establish a prima facie case of discrimination. For the reasons that follow, we hold that, viewing the evidence in the light most favorable to Fry, the District Court did not err in finding evidence sufficient to establish a prima facie case of discrimination.

We have held that the method for establishing either gender discrimination under Title VII or age discrimination under the ADEA follows the same framework erected by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 352 (3d Cir. 1999) (involving discrimination claim under Title VII); Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 644 (3d Cir. 1998) (involving discrimination claim under the ADEA). Under this burden-shifting analysis, a plaintiff must first establish a prima facie case of discrimination

based on sex or age. Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); Keller v. Orix Credit Alliances, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997) (en banc). If the plantiff can make out her prima facie case, the burden shifts to the defendant to produce a legitimate, non-discriminatory reason for the employee's dismissal. Pivirotto, 191 F.3d at 352 n.4. If the defendant satisfies this burden, the plaintiff must prove by a preponderance of the evidence (either circumstantially or directly) that the nondiscriminatory reason proffered by the defendant was pretextual and that unlawful discrimination was the true motivation behind the adverse employment decision. Id.

A.

DCI disputes whether Fry's discharge occurred under circumstances which give rise to an inference of discrimination because of the favorable treatment received by an alleged similarly-situated employee. At the outset, we recognize the elements of the plaintiff's prima facie case of discrimination will vary depending on the circumstances surrounding the claim.

To satisfy the burden of production required for a prima facie case of discrimination, a plaintiff must demonstrate that she (1) is a member of a protected class, i.e., was a woman or at least forty years of age (29 U.S.C. § 631(a)); (2) was performing her job satisfactorily; (3) was fired; and that (4) the circumstances surrounding her discharge give rise to an inference of discrimination. Simpson, 142 F.3d 644 n.5; Keller, 130 F.3d at 1108. The threshold for carrying this burden is low. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993); Burdine, 450 U.S. at 253 ("The burden of establishing a prim facie case of disparate treatment is not onerous."); Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 523 (3d

Cir. 1992). To establish an inference of disparate discriminatory treatment, plaintiff may show that her employer treated her less favorably than a similarly situated employee outside her protected class. Simpson, 142 F.3d at 644-45; Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994). This method of establishing employment discrimination recognizes that finding direct evidence of an employer's discriminatory motivation will be difficult. Sheridan, 100 F.3d at 1071.

Whether two employees are similarly situated presents a fact-specific inquiry for the jury. Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir. 2000); Simpson, 142 F.3d at 644-45. Generally it will require that the plaintiff and the comparator be subject to the same workplace standards and involve conduct of comparable seriousness. See McDonnell Douglas, 411 U.S. at 804; see also McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11 (1976). While there should be an "objectively identifiable basis for comparability," Cherry v. Am. Tel. & Tel. Co., 47 F.3d 225, 229 (7th Cir. 1995), between the plaintiff's and the comparator's cases, their cases need not be identical. See Conward v. Cambridge Sch. Comm., 171 F.3d 12, 20 (1st Cir. 1999) (noting "the plaintiff's case and the comparison case...need not be perfect replicas").

1.

At trial, Fry argued that Alan Shearer, a mail DCI employee under the age of forty, was a similarly situated employee who was treated more favorably for comparable improper conduct. During her tenure at DCI, Shearer committed twenty-four rule violations, some of which arguably threatened the safety of the clinic's patients. These included placing a patient in the wrong potassium bath, failing to properly calibrate a UF pump, placing a wrong sized dialyzer on a patient, falsifying records that indicated equipment had

been tested, and falsifying records that suggested equipment had been checked. In comparison, Fry incorrectly dated comments on a progress note and omitted her entry on the rewritten note. At trial, the clinic's medical director acknowledged that Shearer's violations could have resulted in harming patients while Fry's actions presented no threat to patient safely. In addition, although Fry may have lost the original progress note, she pointed out that DCI has a photocopy of the original for its files.

Defendant argues that Shearer was not similarly situated to Fry because, unlike her, he did not occupy a managerial position. DCI claims it holds managers to a higher performance standard than other employees. For this reason, it contends comparing Fry to Shearer is inapt. Fry was the Clinic Supervisor, in charge of supervising the clinic, maintaining the clinic's medical records, and enforcing the medical records policy, while Shearer was an unlicensed, hourly paid, machine technician who had no contact with patient's progress notes or medical records.

Irrespective of the similarity between their positions, DCI contends the workplace violations committed by the two employees were not comparably serious. DCI claims the integrity of its medical records is a paramount concern and the records with which Shearer worked were qualitatively less significant. Because government inspection of the clinic's medical records requires access to the original records, DCI argues this heightened scrutiny is justified. For this reason, DCI claims that Shearer's record keeping transgressions, which never involved a patient's medical records, are not comparable to Fry's alleged violation. As a result, DCI contents Shearer could not be used as a viable comparator.

In response, Fry notes that both she and Shearer were subject to the same set of workplace rules and regulations, and worked under the same supervisor. Furthermore, nothing in DCI's rules and regulations indicates that managers will be held to stricter standards than other employees.[2] Nor is there any provision in DCI's rules and regulations explaining that violations of the clinic's medical records policy will be addressed more strictly than other record keeping transgressions.[3] Moreover, even if its could be argued that Shearer was not similarly situated at the time of her dismissal, Fry notes that Shearer had previously worked as a technical supervisor who was not fired for numerous violations of the clinic's rules and regulations.

Whether these employees were similarly situated presented a material question of fact for the jury. Fry was unable to point to evidence from which a jury could reasonably infer a similarly situated male employee under the age of forty was treated more favorably. See Simpson, 142 F.3d at 647. We believe a rational jury could find that everyone under DCI's workplace regulations was subject to the same standards regardless of their employment status. In other words, the rules could apply equally to all employees regardless of their position. A jury could also rationally conclude that Shearer's numerous and varied rules violations were comparably serious

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[2] The stated purpose of DCI's rules and regulations is "[t]o develop guidelines regarding employee discipline and discharge to assure fair, equitable and consistent treatment of *all employees*." (emphasis added). App. at 158.

[3] As grounds for immediate termination, in fact, DCI's rules end regulations state, "Falsifying any facility records which includes but [i]s not limited to wrongfully documenting that any procedure, machine checks, vital signs checks, etc. were completed by were actually omitt[ed]." App. at 158.

to Fry's infraction. We hold the court's denial of defendant's motion for judgement as a matter of law for failure to establish a prima facie case of discrimination was proper. [4]

B.

If a plaintiff establishes her prima facie case of discrimination, the burden shifts to defendant to "produce some evidence of a legitimate, nondiscriminatory reason for the adverse employment action." Pivirotto, 191 F.3d at 352 n.4. If the defendant satisfies this burden, plaintiff can survive

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[4] Because Fry was replaced by an older women, DCI also argues a prima facie case of discrimination cannot be made. We disagree.

The discrimination laws focus on protecting individuals, rather than a protected class us a whole, and an employer "may not escape liability for discriminating against a given employee on the basis of [sex or age] simply because it can prove it treated other members of the employee's group favorably." Graham, 230 F.3d at 43 (citing Connecticut v. Teal, 457 U.S. 444, 453-55 (1982)). A "plaintiff's inability to prove that she was replaced by someone outside her class is not necessarily inconsistent with her demonstrating that the employer treated her 'less favorably than others because of [her]...sex....'" Pivirotto, 191 F.3d at 353 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 576, 577 (1978)). As a result, we have held that "it is inconsistent with Title VII to require a plaintiff to prove that she was replaced by someone outside her class in order to make out a prima facie case." Graham, 230 F.3d at 355. Under the ADEA, the Supreme Court has also determined that replacement by someone younger is unnecessary to establish a prima facie case of discrimination. O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996) ("The fact that one person is the protected class has lost out to another person in the protected class is thus irrelevant, so long as the [s]he lost out *because of [h]er age*"). This is true because a woman may still be treated differently from similarly situated younger, male employees even when she is replaced by a woman. Pivirotto, 191 F.3d at 353-54. Neither statute requires plaintiff to be replaced by someone outside the protected class to establish a prima facie case of discrimination.

judgment as a matter of law by submitting evidence "from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Fuentes, 32 F.3d at 764. To accomplish this, a plaintiff "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them 'unworthy of credence,'" Id. at 765 (quoting Ezold, 983 F.2d at 531). But the jury is allowed to return a verdict in plaintiff's favor if it does not believe the employer's proffered reason for discharge. Hicks, 509 U.S. at 511; see also Smith v. Borough of Wilkinsburg, 147 F.3d 272 (3d Cir. 1998). Put simply, a plaintiff must prove by a preponderance of the evidence that the stated reason was pretextual and that the employment action was caused by unlawful discrimination. Pivirotto, 191 F.3d at 352 n.4.

Even if Fry made out her prima facie case, DCI contends she did not present sufficient evidence to demonstrate that her dismissal for failure to produce the original progress note was pretextual. For this contention, DCI maintains that David Hagewood, the Director of Human Resources, was unaware of Fry's sex or age when he told Chabal to dismiss her is she could not locate the original progress note. For her part, Fry denies any responsibility for the loss of the original progress note and claims its importance is mitigated because DCI still has a photocopy. Under these facts, we hold the jury could have disbelieved defendant's statement that Fry would have been fired for her actions absent discrimination.

Fry also introduced evidence of conduct by Chabal that arguably revealed gender and age bias. This evidence included testimony by Fry as well as other DCI employees that involved

inappropriate sexual comments and age remarks uttered by Chabal. DCI contends Chabal's comments and actions are immaterial, since he was not the person ultimately responsible for dismissing Fry. But the trial record demonstrates that Chabal participated in the termination decision to such an extent that we cannot say he was "outside the chain of decsionmakers who had authority to hire and fire plaintiff." Woodson, 109 F.3d at 922 (quoting Gomez v. Allegheny Health Serv., Inc., 71 F.3d 1079, 1085 (3d Cir. 1995)). Even if Chabal was not the final voice on employment decisions at DCI, he played a critical role in the decision process because of his authority to raise personnel issues with Hagewood. We hold the jury could have rationally believed that invidious discrimination was the motivating force behind Fry's dismissal.

Lastly, we recognize that demonstrating that a similarly situated employee who belongs to a nonprotected group received more favorable treatment can also serve as evidence that the employer's proffered legitimate, nondiscriminatory reason for the adverse job action was a pretext for gender bias or age discrimination. Because a jury could rationally conclude there was disparate treatment in DCI's termination of Fry when compared to a similarly situated employee, it could also rationally find that DCI's proffer of a nondiscriminatory reason for Fry's dismissal was pretextual.

V.

DCI contends the District Court improperly charged the jury with a mixed-motive discrimination instruction. We disagree.

We review jury instructions in context under an abuse of discretion standard. Pivirotto, 191 F.3d at 350. However, "our review is plenary when the question is whether the

instruction misstates the law." Walden v. Georgia-Pacific Corp., 126 F.3d 506, 513 (3d Cir. 1997).

If a timely objection has not been lodged, "we review for plain error and we will reverse only if the trial court committed error that was fundamental and highly prejudicial, such that the instructions failed to provide the jury with adequate guidance, and the District Court's refusal to consider the issue would result in a miscarriage of justice." Alexander v. Riga, 208 F.3d 419, 426 (3d Cir. 2000). This discretionary review should only be exercised sparingly. Simmons v. City of Philadelphia, 947 F.2 1042, 1078 (3d Cir. 1991).

In this case, DCI did not object to the trial court's jury instruction. Moreover, the District Court did not commit error, let alone plain error. The court properly instructed the jury that if Fry established her prima facie case of discrimination and DCI offered a nondiscriminatory reason for the adverse employment action, Fry had the burden of demonstrating by a preponderance of the evidence that the employer's alleged nondiscriminatory reason for her termination was pretextual. This was the proper instruction.

VI.

DCI also claims the District Court abused its discretion when it (1) admitted testimony by clinic employees involving sexual and age related remarks made by Chabal; (2) admitted evidence of Shearer's disciplinary record; and (3) denied Hagewood from testifying about comments made to him in the course of investigating Fry's allegations.

We review the District Court's decision to admit or exclude evidence for abuse of discretion. Becker v. ARCO Chemical Co., 207 F.3d 176, 180-01 (3d Cir. 2000) (collecting

cases). DCI only briefly touches on these claims. But our review of the record demonstrates the District Court exercised its sound discretion in finding the probative value of the remarks allegedly made by Chabal outweighed their prejudicial effect. Moreover, Hagewood's third-party testimony constitutes hearsay to which there is no applicable exception. We see no abuse of discretion.

VII.

For the foregoing reasons, we will affirm the judgment of the District Court.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Anthony J. Scirica
Circuit Judge

DATED:

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon Nicholas J. Evashavik, 520 Grant Building, 310 Grant Street, Pittsburgh, PA 15219 by U.S. Mail, postage prepaid, this 13th of September, 2001.

/s/Thomas J. Bender

Thomas J. Bender, Jr.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NELLIE A. FRY,	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	Civil Action
	)	No. 98-1975
DIALYSIS CLINIC, INC. and DAVID CHABAL,	)	
	)	
	)	
Defendants.	)	

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict upon answers to special written interrogatories.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment entered in favor of Plaintiff, Nellie A. Fry and against Defendant, Dialysis Clinic, Inc. in the amount of $73,700.00

Judgment is hereby entered in accordance with the above special verdict.

APPROVED:_____
UNITED STATES DISTRICT JUDGE

June 30, 2000
Date

_____
Clerk

/s/Linda C. Krings
(By) Deputy Clerk

Robert W. Pritchard
Buchanan Ingersoll
301 Grant Street
One Oxford Centre, 20th Floor
Pittsburgh, PA 15219

CLERK'S OFFICE
United States District Court
for Western Pennsylvania

Civil Action No. 2:98-cv-01975
FRY v. DIALYSIS CLINIC, INC

There was entered on the docket June 30, 2000, an (judgment) entered in favor of pltf and against Dialysis Clinic, Inc.

James A. Drach, CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NELLIE A. FRY,	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	Civil Action
	)	No. 98-1975
	)	
DIALYSIS CLINIC, INC. and DAVID CHABAL,	)	
	)	
	)	
Defendants.	)	

AMBROSE, District Judge.

OPINION
and
ORDER OF COURT

Pending before the Court is the Motion for Summary Judgment of Defendants Dialysis Clinic, Inc. ("DCI") and David Chabal ("Chabal") on the claims brought against them by Plaintiff Nellie Fry ("Plaintiff" or 'Fry'). For the reasons set forth below, the Defendants Motion is granted as to the plaintiff's claims for retaliatory discharge, sexual harassment, defamation, negligence, and breach of contract against both Defendants DCI and Chabal, granted as to Plaintiff's claims for discriminatory discharge under the ADEA and Title VII as to Defendant Chabal, and denied as to Plaintiff's claims for discriminatory discharge under the ADEA and Title VII as to Defendant DCI.

STANDARD OF REVIEW

Summary judgment may only be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. p. 56(c). Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In considering a motion for summary judgment, this Court must examine the facts in a light most favorable to the party opposing the motion. International Raw Materials. Ltd. v. Stauffer Chemical Co., 898 F.2d 946, 949 (3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence creates no genuine issue of material fact. Chipollini v. Spencer Gifts. Inc., 814 F.2d 893, 896 (3d dr. 1987). The dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is material when it might affect the outcome of the suit under the governing law. Id. Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. Celotex, 477 U.S. at 322.

LEGAL ANALYSIS

Defendants move for summary judgment on the following claims against them by Plaintiff: (1) sex and age discrimination in her discharge; (2) retaliatory discharge; (3)

sexual harassment; (4) defamation; (5) negligent hiring and/or retention of Chabal, the supervisor who allegedly harassed her; (6) negligent approval of Plaintiff's discharge while being aware of unlawful motives; and (7) breach of contract created by her employee handbook.

Preliminarily, in her Brief in Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Opposition brief"), Plaintiff only discusses her discriminatory discharge claims under Title VII and the ADEA and does not dispute any of the Defendants' contentions with respect to the rest of Plaintiff's claims. Indeed, the conclusion to Plaintiff's Opposition Brief reads "[f]or the foregoing reasons, defendant's motion for summary judgment for plaintiff's claims of discriminatory discharge under Title VII and the ADEA must be not [sic] be denied." Plaintiff's Opposition Brief, p. 17. Accordingly, I read Plaintiff's failure to provide any substantive opposition to Defendant's Motion for Summary Judgment with respect to any claims for sexual harassment, retaliatory discharge, breach of contract, negligence and defamation to be an acknowledgment that summary judgment is properly granted as to said claims and therefore, grant Defendant's motion for summary judgment as to Plaintiff's claims against the Defendants for sexual harassment, retaliatory discharge, breach of contract, negligence and defamation with prejudice.

Having so held, I turn next to Defendants' Motion with respect to Plaintiff's gender and age discrimination claims. Fry claims that she was terminated from her employment on July 30, 1996, by Chabal after she was unable to produce an original medical record on which she had made an error and for which she had substituted a rewritten record. Plaintiff contends that another DCI employee, Alan Shearer ("Shearer"), a male under forty (40) years of age, was treated more favorably than she. First, with respect to these claims as against Chabal individually, Defendants argue that there cannot be individual

liability against Defendant Chabal because Title VII and the ADEA do not provide for individual liability. I agree. It is well settled in this circuit that there is no individual liability under Title VII. See Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1077 (3d dir. 1996), cert. den'd, 521 U.s. 1129 (1997). Moreover, while the United States Court of Appeals for the Third Circuit has not addressed the issue of individual liability under the ADEA, because the ADEA and Title VII statutes define the term "employer" similarly and share the same basic purpose, i.e. to prohibit discrimination in employment against members of certain class, the district courts within this circuit have concluded that for the same reasons that there is no individual liability under Title VII, there can be no individual liability under the ADEA. See, e.g., Kohn v. AT&T Corp., 58 F. Supp.2d 393, 421 (D.N.J. 19pp); Moore v. Acme Corrugated Box Co., Inc., 1997 WL 535906, *2 (E.D. Pa. Aug. 4, 1997). See also Stults v. Conoco. Inc., 76 F.3d 651, 655 (5th Cir. 1996); Smith v. Lomax, 45 F.3d 402, 403 n. 4 (11th Cir. 1995); Birkberk v. Marvel Lighting Corp., 30 F.3d 507, 510-11 (4th Cir.1994), cert. den'd, 513 U.S. 1058 (1994); Miller v. Maxwell's Intern. Inc., 991 F.2d 583, 587-88 (9th Cir. 1993), cert. den'd, 510 U.S. 1109 (1994); Sabo[illegible] v. Ohio Dept. of Educ., 1998 WL 57337, *1(6th Cir. [illegible]o. 2, 1998). Accordingly, the Defendants' Motion for Summary Judgment on the ADEA and Title VII claims brought by Plaintiff against Defendant Chabal individually is granted and said claims dismissed with prejudice.

Concerning Plaintiff's discriminatory discharge claims in general (i.e. both as against DCI and Chabal), Defendants first argue that Plaintiff cannot establish a prima facie case of discriminatory discharge under either Title VII or the ADEA because Plaintiffs discriminatory discharge claims are premised upon her being treated differently than fellow employee Shearer, a male DCI employee who worked at the same DCI clinic as Plaintiff, DCI-Wilkinsburg, and who was under the

age of forty (40). Defendants claim that Shearer was not a person similarly situated to Plaintiff and was not treated any differently than Plaintiff.

More specifically, Defendants argue that Plaintiff, a licensed nurse, was a licensed professional employee and the Clinical Supervisor at the DCI-Wilkinsburg facility and was at first given the opportunity to fix the medical record at issue when she explained to Chabal that she had simply entered the wrong date for when she contacted a patient who had failed to appear for a dialysis treatment. Defendants contend that plaintiff was ultimately terminated for losing or destroying an original medical record. On the other hand, Shearer, according to Defendants, was not, as was Plaintiff, a licensed nurse nor a supervisor, but was a former hourly technician at DCI, who had made a false entry on a water treatment testing log, which is not a medical record, and was disciplined, but not fired.

In response, Plaintiff first contends that she and Shearer are persons similarly situated and Shearer was treated differently than Plaintiff. Specifically, Plaintiff contends that Fry is comparable to Shearer because: (1) ultimately Chabal was in charge of all employees at the DCI-Wilkinsburg clinic, including Fry and Shearer, and all discipline of these employees was subject to Chabal's approval; (2) it is irrelevant that Plaintiff was a licensed professional and Shearer was not a licensed professional; (3) all DCI employees were subject to the same set of rules and regulations; (4) Plaintiff's subjective belief that she could be held to a higher standard is meaningless because DCI, not Fry, promulgated and published all applicable rules and regulations; and (5) the acts of destroying an original medical record and of falsifying medical records are comparable instances of misconduct since DCI rules and regulations categorize as the basis for immediate termination "[f]alsifying any facility records which includes... but not limited to wrongfully documenting that any procedure,

machine checks, vital sign checks, etc. were completed but were actually omitted," (see Exhibit C to Complaint). According to Plaintiff, that is what Shearer did when he marked down that he had performed a water test on July 29,1996, when he had not actually completed such a test on that date but instead, performed the test on July 30, 1996 and then wrote down the results for both July 29, 1996 and July 30, 1996.

Concerning whether Plaintiff and Shearer were similarly situated, I find first that simply because Plaintiff was a licensed nurse and Shearer an hourly-paid technician does not negate the possibility that the two individuals were similarly situated. Moreover, I find that because under the facts of this case viewed in a light most favorable to Plaintiff, all DCI employees, both supervisory and non-supervisory, were subject to the same rules and regulations, there is a genuine factual issue as to whether Plaintiff and Shearer were similarly situated.

Thus, the next query is whether Plaintiff and Shearer engaged in comparable forms of misconduct and yet Shearer was treated more favorably. A review of DCI's rules and regulations applicable to both Plaintiff and Shearer shows that among the grounds for immediate termination were "[f]alsifying any facility records which includes but not limited to wrongfully documenting that any procedure, machine checks, vital signs checks, etc. were completed but were actually omitted." A note dated October 23, 1995 from Shearer's personnel file states "while performing pump calibration I found that Alan Shearer did not perform PrU3 [?] calibrations as he checked off on PM [?] check list. I corrected Cal and performed rest of C3 PM [?]." A note from Shearer's personnel file dated July 30, 1996 states: "[t]his document serves as a second written warning regarding work performance for Alan Shearer, a machine reuse technician at DCI Wilkinsburg. Alan has violated DCI's policy regarding

falsifying documentation and jeopardizing patient safety. On 7-29-96 Alan failed to test the water treatment system and record the result in the water treatment system log. It was discovered by me on 7-29-96 and a copy of the log was made. On 7-30-96 Alan did the testing and logged the results, along with filling in falsified information for 7-29-96 (see attached forms)." Based upon this conduct by Shearer, I find that there is a genuine issue of material fact as to whether Shearer was treated more favorably than was Plaintiff.

Alternatively, Defendants argue that even if Fry can state a prima facie case of discriminatory discharge, she cannot overcome the legitimate non-discriminatory reason proffered by DCI for her termination. DCI's legitimate non-discriminatory reason for Plaintiff's termination is that Plaintiff either lost or destroyed an original medical record. In support of this position, DCI contends that Plaintiff cannot establish pretext because any remarks concerning Plaintiff's gender or age were isolated stray remarks by Chabal which were both unrelated to Plaintiff's discharge and were not made by the decision maker. DCI also argues that Plaintiff has no explanation for why, if Chabal was prejudiced against older employees or females, the replacement he hired for Plaintiff was a female who was older than Plaintiff, or why Chabal did not terminate Plaintiff on July 11,1996 when he confronted her with the false entry made for July 5,1996, but rather, accepted Plaintiff's explanation and provided her the opportunity to correct her alleged mistake. Id. at p. 13.

In response, Plaintiff first contends that she can demonstrate that DCI's stated reason for terminating her was pretextual through direct evidence of bias such as discriminatory statements and admissions. Plaintiff's Supporting Brief, p. 14. Specifically, Plaintiff argues that Chabal was her supervisor and in charge of the DCI-Wilkinsburg clinic and that he clearly was a

manager/decision maker and made statements that demonstrated an unequivocal bias. Plaintiff then cites to the following comments made by Chabal:

> Chabal stated that if other female employees had big brown hair or a brown wig and big breasts they would get along better at their clinic or go far at DCI. Chabal repeatedly referred to his "appendage", meaning his penis. Chabal often told inappropriate sexual jokes or made inappropriate comments. Chabal made other sexual comments to female employees that were known to Fry. Chabal regularly referred to Fry as old or made age-related comments. On another occasion Chabal approached a female DCI employee from behind her and began touching the back of her neck.

Plaintiffs Opposition Brief, p. 15. Alternatively, Plaintiff contends that there is evidence of record from which one could disbelieve DCI's proffered reason for Plaintiff's termination because: (1) Plaintiff knew at the time of the incidents in question that an original medical document is a significant document in the medical profession; (2) Plaintiff knew that Chabal and DCI were aware of her charting error; (3) an exact duplicate of the original existed; and (4) Plaintiff did not throw away the original document, but rather, she returned the progress note to the charge nurse's desk which was in compliance with DCI-Wilkinsburg procedure.

"To defeat a summary judgment motion based on a defendant's proffer of non-discriminatory reasons, a plaintiff who has made a prima facie showing of discrimination need point to some evidence, direct or circumstantial, from which a factfinder could reasonably either: (1) disbelieve the employer's

articulated legitimate reason; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 330-31 (3d Cir. 1995), citing, Fuentes v. Perskie, 32 F.3d 759, 763-64 (3d Cir. 1994). Further, "[t]o discredit the employer's proffered reason, . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a factfinder could rationally find them 'unworthy of credence'." Fuentes, 32 F.3d at 765, quoting, Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1992), cert. den'd, 510 U.S. 806 (1993) (internal citations omitted).

After careful consideration of the record evidence, I find that viewing the facts of record in a light most favorable to Plaintiff, including, but not limited to, the statements made by Chabal, Plaintiff's supervisor, to Plaintiff related to her age and gender and the facts that support Plaintiff's prima facie case, there is a genuine issue of material fact as to whether a discriminatory motive was more likely than not a motivating reason behind DCI's action. Accordingly, Defendants' Motion for summary Judgment on Plaintiff's discriminatory discharge claims under the ADEA and Title VII is denied as to Defendant DCI.

##########

DATE FILED: JANUARY 18, 2000

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NELLIE A. FRY,	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	Civil Action
	)	No. 98-1975
	)	
DIALYSIS CLINIC, INC. and DAVID CHABAL,	)	
	)	
	)	
Defendants.	)	

AMBROSE, District Judge.

ORDER OF COURT

AND NOW, this 18th day of January, 2000, after careful consideration and for the reasons set forth in the Opinion accompanying this Order, it is **ORDERED** that the Defendants' Motion for Summary Judgment (Docket No. 8) is **GRANTED** as to the Plaintiff's claims for retaliatory discharge, sexual harassment, defamation, negligence, and breach of contract against both Defendants DCI and Chabal; **GRANTED** as to Plaintiff's claims for discriminatory discharge under the ADEA and Title VII as to Defendant Chabal; and **DENIED** as to Plaintiff's claims for discriminatory discharge under the ADEA and Title VII as to Defendant DCI.

BY THE COURT:

/s/Donetta W. Ambrose

Donetta W. Ambrose,
U.S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD COURT

No. 00-2222

NELLIE FRY

v.

DIALYSIS CLINIC, INC; DAVID CHABAL

Dialysis Clinic, Inc., Appellant

(D.C. Civ. No. 98-cv-01975)

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH,
McKEE, BARRY, AMBRO, FUENTES, GARTH* and
STAPLETON*, Circuit Judges

---

* As to panel rehearing only.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/Anthony J. Scirica
Circuit Judge

Dated: October 16, 2001

APPENDIX E

The relevant portion of 29 U.S.C. § 623 et. seq. provides:

It shall be an unlawful for an employer -

> (1) to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623 (a)(1).

The relevant portion of 42 U.S.C. § 2000e et. seq. provides:

It shall be an unlawful employment practice for an employer -

> (1) to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1).

Supreme Court, U.S.
FILED
FEB 14 2002
CLERK

(2)

No. 01-1046

In The

Supreme Court of the United States

DIALYSIS CLINIC, INC.,

Petitioner,

v.

NELLIE FRY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE FACTS

Nellie Fry was hired as a clinical supervisor in Defendant's Wilkinsburg office in July of 1993. Ms. Fry's duties were to hire nurses, staff and patient education and supervision of the nurses. In the chain of command at DCI clinics the administrator was at the top. Next in line were the clinical supervisor, Nellie Fry, and the chief technician, Alan Shearer. Ms. Fry supervised approximately twenty to thirty employees whereas Alan Shearer supervised approximately six employees. Ms. Fry could not initiate any discipline against Alan Shearer. David Chabal replaced Roger Boles as administrator in October of 1995, and became Fry's immediate supervisor. She was fired on July 30, 1996, when she was fifty-three years of age.

Nellie Fry was fired supposedly because "she destroyed a medical document or record". The document at issue was a 1996 progress note for a patient. Fry was off work on July 4th and 5th, 1996 (Thursday and Friday). She went to the clinic on Saturday, July 6 and learned that a patient had not shown up for his dialysis on Friday, July 5. Saturday was her day off, but she frequently went to the clinic. She looked at the subject chart, observed that he had missed his treatments and called his home, but no one answered. She marked his chart a "no show" and that she called him. However, she innocently entered the date as "7/5/96".

On Monday, July 8, 1996, Fry went to Chabal and told him that this patient had missed his three scheduled treatments for the prior week. On that same day Lori

Peterle, Dr. Cooksey's nurse practitioner, went to Cooksey, the medical director at DCI, concerning entries on this page. Then, three days later, on July 11, 1996, Chabal met with Fry and they discussed the patient's chart. The only topic was Fry's misdated entry on the subject chart. At that time Fry acknowledged the dating error of the 7/5/96 entry. Her entry should have been dated 7/6/96.

Chabal ordered Fry to "rewrite it or fix it". He did not reprimand or discipline her for this entry. Fry had the entire page rewritten in accordance with the instructions given to her by Chabal. Fry went to the nurses and told them to make their entries anew (just as they had before) and to date the rewritten entries as having been made on 7/11/96. The result of this was a rewritten chart. It was confirmed that Fry had gone to the DCI medical director, Dr. Cooksey, for guidance on how to correct the entries.

The rewritten note shows the date of entry as 7/11/96, followed by a notation of when the entry was originally made or when the matter was actually done. Fry had everyone make the proper entries on the new progress note, but she forgot to make her entry for 7/5/96, the Saturday she also called the patient. This was the manner in which Fry endeavored to correct the chart. After she made the corrections, she took both the original and rewritten charts and in accordance with DCI policy placed them on the desk of the charge nurse. Because the patient's chart was not available at that time, the rewritten chart could not be placed in file at that time. This was the policy of the DCI clinic and it made sense to do so rather than search the entire premises for a chart. The charge nurse would do the filing later.

DCI's rules and regulations governed the handling of medical records. According to the rules, it was the duty of the clinical supervisor (Fry) to maintain the patients' charts or to designate another to do so. DCI admitted that someone other than the clinical supervisor can be designated to maintain the records. Fry created the records maintenance policy for the clinic in which she worked. In doing so she designated the charge nurse as the responsible party. The policy which she implemented was such that if a patient's chart could not be located progress notes were to be left on the charge nurse's desk and filed by the charge nurse at the end of the day. Dr. Cooksey confirmed this practice as did another DCI employee, Emily Jiran. Ms. Jiran also confirmed that there is no precise rule on maintenance of medical records for all DCI clinics. It is left up to each individual clinic to form its own policy.

On July 30, 1996, Chabal and his assistant came to Fry's office. They asked her where the original chart for 7/5/96 was. She told them it was in the patient's file, and they responded that it was not. She told them she laid it on the charge nurse's desk. She denied ever saying or admitting that she threw it away. No one ever conducted a search to locate the original. Additionally, it is undisputed that DCI was in possession of a copy of the original note. After advising Fry that Alan Shearer had falsified a chart and had been placed on one year probation, she was fired by Chabal solely because she was unable to produce the original progress note. Fry had no prior disciplinary incidents of any nature during her entire employment history with DCI and always received excellent evaluations.

Comparator, Shearer Similarly Situated

Another employee at the Wilkinsburg office was Alan Shearer. When Fry began at DCI, Shearer was a supervisor and chief technician. His position was parallel with Fry's. Shearer supervised the machine operators and was responsible for tending to the dialysis machines. Fry was responsible for the nurses. As of July 30, 1996, Shearer was no longer the chief technician but rather a technician. In either role Shearer's duties included performing safety tests on equipment responsible for the life or death of patients. Regardless of his job title, at no time did Shearer report to Fry. Moreover at all times Fry neither had authority over Shearer nor could she discipline him. All matters of discipline were at the sole discretion of the administrator, Chabal. Fry and Shearer both reported to the same administrator. They both had responsibilities for patients' safety. They were both bound by the same work rules and regulations as published by DCI. At all times they were both evaluated by the administrator under the same standards and on the same evaluation form. They were equals in every relevant aspect.

Shearer's employment record was abysmal; he was on probation twice, had four written warnings, eleven write-ups and eight verbal warnings. In all there were twenty-four disciplinary events. One of these incidents, which occurred contemporaneously with Fry's termination, was the falsification of test results for a water treatment log. One of Shearer's responsibilities included testing water values for machines that were used to treat patients. On July 29th, 1996 it was discovered that he failed to perform these tests. The next day, July 30th, it was discovered that Shearer had filled in the values for

the water treatment tests for both July 29th and 30th. Shearer had apparently performed the tests on the 30th and then fraudulently filled in almost identical numbers for both days.

DCI strains to make a distinction that Fry falsified a medical record while Shearer did not. Shearer made an entry that he had checked the water system of the dialysis machine when he had not. His job was to test the water for the machines to assure that the water had no impurities. If there were impurities, a patient could die. These are grounds for immediate termination under DCI rules, which include, "Falsifying any facility records . . . machine checks . . . actually omitted". There is evidence that a water treatment log is a medical record because it relates to a patient's care. Regardless, Shearer was only put on probation for his twenty-fourth rule violation.

DCI's physician, Dr. Cooksey, admitted that what Fry was accused of doing did not endanger a patient's life. Cooksey also testified that several of Shearer's actions potentially endangered patient's lives. Several of these violations were committed while Shearer was the chief technician and a supervisor. Dr. Cooksey stated that Shearer did in fact falsify a medical record, as did Richard Kelly, who was then an assistant administrator and a current administrator, and Bob McDivitt, another DCI administrator. Patient care is DCI's highest priority and any act which might endanger the safety or lives of another is always an immediate termination offense. However, Fry was fired and Shearer was not.

Alleged Higher Standard

DCI published and enforced a single set of Rules and Regulations which governed all employees regardless of status. There are no separate rules for different jobs; there are not multiple tracks of discipline. These rules establish a procedure for discipline, from verbal warning to discharge. The procedure is progressive in nature. All employees are governed by the same standard irrespective of one's position. The stated purpose of DCI's rules and regulations is, "to develop guidelines regarding employee discipline and discharge to assure fair, equitable and consistent treatment of *all employees.*" (Emphasis added). All jobs are judged in the same manner in regard to safety. If there was a different rule for managerial personnel it was never communicated in writing or orally nor was it ever enforced prior to Fry's discharge. In fact, in regard to patient safety there was one standard applicable to all employees.

Further, DCI's argument that it held its supervisors to a higher, unwritten standard is unsupported by the facts; Shearer, when he was the head technician and supervisor, was never held to any higher standard. It is undisputed that when Shearer began at DCI he was the chief technician and a supervisor. During his tenure at DCI, Shearer committed 24 rule violations many of which occurred while Shearer was the chief technician. Among the violations committed while chief technician included those which potentially endangered DCI patients' health and safety, including putting a patient on the wrong potassium bath on two separate occasions. Dr. Cooksey confirmed that these violations potentially jeopardized patient's health and safety whereas Fry's actions did not.

DCI admitted that any act which endangers the safety of lives of its patients is always a termination offense and yet Shearer, a supervisor, was not terminated for doing so several times. Even if DCI truly did hold supervisors to a higher, unwritten standard it was not applied to a younger male, Shearer.

DCI notes that Jeffrey Gaines, a younger male employee, was fired for falsifying a medical record. Gaines cannot be compared to Fry. Gaines was allegedly terminated for signing another staff person's initials to a medical record. His termination occurred after the subject litigation had commenced. Moreover, he was a probationary employee, who admitted that he directly entered false data on a medical record. He signed another employee's initials, for actions taken by that employee, to a patient's chart. Plaintiff, on the other hand, admitted that she had mistakenly entered the wrong date, for actions she herself had taken, on a record. These incidents are inapposite.

REASONS FOR DENYING THE WRIT

I. The Decision of the Court of Appeals Is Not in Conflict with the Cases of this Court.

All inferences of fact must be made in favor of the verdict winner, and all evidence must be viewed in a light most favorable to the verdict winner. *Woodwind Estates, Ltd. v. Gretowski*, 205 F.3d 118 (3rd Cir. 2000).

DCI cites two cases, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed. 2d 633 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118

S.Ct. 2275, 141 L.Ed. 2d 662 (1998), as controlling regarding the issue of disparate treatment. This reliance is misplaced. These cases generally stand for the proposition that an employer can be vicariously liable to a victimized employee for an actionable hostile environment created by a supervisor who has authority over the victim. There is no dispute in this case that DCI discriminated against Fry and that the person who did so was Fry's immediate supervisor, the administrator, Chabal. The only issues are whether Fry and Shearer were similarly situated and thus adequate comparators and, secondarily, did DCI hold managers to a higher standard of conduct.

In order to identify an adequate comparator the "comparables" must be similarly situated in all respects. *Stotts v. Memphis Fire Department*, 858 F.2d 289 (6th Cir. 1988). To be deemed "similarly situated" the individuals with whom the plaintiff seeks to compare his or her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. *Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6th Cir. 1992). However, plaintiff's case and the comparison case need not be identical. *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 20 (1st Cir. 1999).

DCI contends that it is an undisputed fact that Fry was Shearer's supervisor. That is wrong. Fry and Shearer were both supervisors. At no time was Fry the supervisor of Shearer. When Fry began at DCI, Shearer was a supervisor and chief technician. His position was parallel with Fry's. Shearer supervised the machine operators and was

responsible for tending to the dialysis machines. Fry was responsible for the nurses. As of July 30, 1996, Shearer was no longer the chief technician but rather a technician. In either role Shearer's duties included performing safety tests on equipment responsible for the life or death of patients. Regardless of his job title, at no time did Shearer ever report to Fry. Moreover at all times Fry neither had authority over Shearer nor could she discipline him. All matters of discipline were at the sole discretion of the administrator, Chabal. Fry and Shearer both reported to the same administrator. They both had responsibilities for patients' safety. They were both bound by the same work rules and regulations as published by DCI. At all times they were both evaluated by the same administrator under the same standards and on the same evaluation form. Therefore they were equals in every relevant aspect.

DCI has presented the facts to this Court as though all inferences are to be made in its favor and viewed in a light most favorable to itself, the verdict loser. It is well established that just the opposite is true. *See, Woodwind Estates, supra.* The facts, as cited above, are all supported by trial testimony. Where there is a dispute of material fact regarding whether or not two employees are similarly situated, as was the case at trial, presents a fact specific inquiry for the jury. *Graham v. Long Island R.R.*, 230 F.3d 34 (2nd Cir. 2000); *Simpson v. Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639 (3rd Cir. 1998). This issue was properly submitted to the jury and resolved in favor of Fry.

II. The Third Circuit's Decision Is Not in Conflict with the Decisions of Other Appellate Courts Because There Are Significant Differences in the Material Facts.

There is no conflict between the Third Circuit's decision in this case and the cases cited by DCI as they are all easily distinguisable. In *Pierce v. Commmonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994), the following was *undisputed;* Plaintiff was responsible for multiple offices, evaluated employees including the comparator, Kennedy, and was responsible for enforcing the sexual harassment policy. Kennedy had none of these responsibilities. In this case, the testimony at trial was that Fry did not supervise Shearer; they were equals. Fry also did not evaluate Shearer's performance. These are substantial differences in the facts that quickly renders *Pierce* inapplicable to the present case.

In *Hoffman v. MCA, Inc.*, 144 F.3d 1117 (7th Cir. 1998), the issue before the Court was age discrimination, not disparate treatment, as is the case here. The plaintiff attempted to bolster his argument that the reason he was fired was pre-textual by comparing his treatment to that of lower level employees. The issue of similarly situated employees was a tangential issue at best and clearly does not stand for the proposition that a vice president and low ranking employees are not adequate comparators. Also, it was again undisputed that the plaintiff was a superior of the comparators.

In *Watts v. City of Norman*, 2001 U.S. App. LEXIS 23905 (10th Cir. November 5, 2001), it was undisputed

that the comparators were a fire chief and his subordinate. This is a substantial and material difference from the case at issue. Shearer was not subordinate to Fry at any time during her employment.

In *Jones, et al. v. Denver Post Corp.*, 203 F.3d 748 (10th Cir. 2000), it was again undisputed that the plaintiff was subordinate to his supervisor. None of the cases cited by DCI are applicable to the instant action. There is a critical distinction between the cases cited by DCI and this case which is fatal to DCI's argument. That being the trial testimony that Fry was not a supervisor of Shearer and had no authority over him. It was the province of the jury, not the Court, to accept or reject this testimony as true. They were equals in every relevant aspect of work. DCI's argument hinges on Fry being a supervisor of Shearer. While these were the facts in the cases cited above, the facts of this case are conspicuously different. This is why DCI's argument must fail. If there is a dispute regarding this issue, it is a fact specific question for the jury. *See, Graham* at 39 and *Simpson* at 644-5, *supra*.

To accept DCI's contention that Fry and Shearer were not similarly situated as a matter of law would be to substitute the Court's judgment for that of the jury. All questions of fact are to be decided by the fact finder. Since all inferences of fact must be made in favor of the verdict winner and all evidence must be viewed in a light most favorable to the verdict winner, it must be accepted as true that Fry and Shearer were similarly situated. *See, Woodwind Estates, supra.*

III. A Higher Standard of Conduct Applicable to Managers Never Existed at DCI or, If it Did Exist, Was Applied in a Discriminatory Fashion.

The last issue is the existence of an illusory higher standard of conduct. DCI attempts to turn the holdings in *Ellerth* and *Faragher* around in stating that this Court requires that all employers impose a higher standard for its managers as opposed to non-managers. This is plainly not the case. *Ellerth* and *Faragher* address vicarious liability where a supervisor engages in illegal conduct. These cases do not hold and there is no authority cited by DCI that requires employers to impose two separate codes of conduct or a higher standard of conduct upon managers versus non-managers. While issue of liability can be effected by the status of an offending employee there is no Court imposed mandate that requires employers to treat managers and non-managers differently. There is ample evidence to support the position the DCI never imposed a higher standard for supervisory employees. Conversely there is little evidence to support the position that it did. In fact the evidence supports the finding that a higher standard did not exist until DCI needed an excuse for its disparate treatment of Fry.

Even if it could be argued that Fry and Shearer were not similarly situated at the time of her firing, the proposition that DCI held managers to a higher standard must fail. Shearer, when he was a supervisor, was never held to a higher standard of conduct. It is undisputed that when Shearer began at DCI he was the chief technician and a supervisor. During his tenure at DCI, Shearer committed 24 rule violations. Many of these rule violations occurred while Shearer was the chief technician. Among those

committed, while a supervisor, were violations that potentially endangered DCI patients' health and safety, including putting a patient on the wrong potassium bath on two separate occasions. Dr. Cooksey confirmed that these violations potentially jeopardized the patient's health and safety.

These violations are in addition to the other numerous transgressions that occurred prior to his demotion when Shearer still enjoyed supervisory status. It is worth noting that Shearer's demotion was not a punishment imposed by DCI but was done at the request of Shearer. Where was this alleged higher standard that, if applied evenly, would mandate the termination of Shearer? Despite patient safety being DCI's highest priority and jeopardizing the same is always an immediate terminable offense, Shearer, a supervisor, was not fired. Nor was Shearer fired for numerous other violations which endangered DCI patients' health and safety, including failing to properly calibrate a UF pump, placing a wrong sized dialyzer on a patient and falsifying records by indicating that he tested equipment when, in fact, he had not.

DCI's argument obviously suggests that they want to have it both ways. DCI did not have a higher standard for a younger male, Shearer, for rule violations that are at the least similar to and at worst much more severe than Fry's while he was a supervisor. If there were, Shearer would have been terminated when he was the chief technician. He was not. However, when DCI needed a reason to justify its discriminatory treatment of an older female, Fry, the higher standard suddenly appears out of thin air. It was the filing of this lawsuit that precipitated the

creation of such standard because it obviously did not exist previously.

But, assuming further that a higher management standard did exist, the fact that Shearer was not fired for the numerous violations cited above while a manager and Fry was fired for lesser offenses is further evidence of sex and age discrimination. The only question is where the jury found illegal discrimination; did the jury reject DCI's contention that it held managers to a higher standard and found discrimination in DCI's firing of Fry and not Shearer for similar violations they each committed in July of 1996; or did they believe that a higher management standard did exist and DCI was guilty of discrimination in imposing the same upon Fry and not Shearer. DCI attempts to present this case in a vacuum limited to the month of July 1996. That is not what the evidence presented at trial indicated and not what the jury relied upon in reaching a verdict.

DCI further argues both sides of the fight when stating that Fry and Shearer are not similarly situated and then in the same breath DCI attempts to compare Fry with a younger male named Jeffrey Gaines. Gaines was a probationary employee who signed another DCI employee's name to a medical chart. So even though Shearer is not comparable, it argues that a probationary employee who signed another's name is. Again, DCI wants to have it both ways. It cannot. If Gaines is comparable then Shearer certainly is too.

To allow DCI to shelter itself from discriminatory action by claiming it holds supervisors to a higher

standard would completely disregard its actions in applying its rules and standards to a younger male, Shearer. The precedent would allow an employer to apply a higher standard arbitrarily at the employer's whim. This would effectively allow an employer to discriminate against its employees and hide such discrimination behind a "higher standard" whenever convenient.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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